85-1620

No.

Supreme Court, U.S.
FILED
APR 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL HOEFT,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PAUL L. DOBBERSTEIN, JR.
3641 Gravois
St. Louis, Missouri 63116
(314) 776-8400
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

At his sentencing hearing, after a plea of guilty to attempt robbery, the court did not permit the petitioner to present evidence in mitigation, or to make a statement on his own behalf, as required by Ill. Rev. Stat. 1983, Ch. 38, §1005-4-1. The question presented is whether this denial of the right to present evidence, or to allow petitioner to make a statement in his own behalf, operated to deprive the petitioner of his constitutional right to due process of law.

PARTIES TO THE PROCEEDING IN THE APPELLATE COURT OF ILLINOIS - FIFTH DISTRICT

People of the State of Illinois, Respondent, and Daniel Hoeft, Petitioner, in cause number 62640.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding in the Appellate court of Illinois - Fifth District	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	1
Constitutional provisions and Statutes involved	2
Statement of Case	2
Argument	3
Conclusion	7
Appendix	A-1
A. Transcript of Sentencing	A-1
B. Opinion (Order) of the Appellate Court of Illinois	A-8
C. Order of the Supreme Court of Illinois	A-12
D. Fourteenth Amendment to the United States Constitution	A-13
E. Illinois Revised Statutes	A-15

TABLE OF AUTHORITIES

Page

Cases:

Anonymous, 3 Mod. 265, 87 Eng. Rep. 175 (K.B.) 4

Green v. United States, 365 U.S. 301 (1961) 4

Hill v. United States, 368 U.S. 424 (1962) 4

McGautha v. California, 402 U.S. 183 (1971) 5

Mempa v. Rhay, 389 U.S. 128 (1967) 5

Townsend v. Burke, 334 U.S. 736 (1948) 4

Williams v. New York, 337 U.S. (1949)..... 6

Constitution and Statutes:

U.S. CONST. amend. XIV 2,3

ILL. REV. STAT., 1983, Chapter 38, §1005-4-1 2,3,4,6

Rule 32(a) Federal Rules of Criminal Procedure 4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL HOEFT,
Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, Daniel Hoeft, prays that a Writ of Certiorari issue to review the judgment of the Illinois Court of Appeals.

OPINIONS BELOW

The Appellate Court of Illinois, Fifth District issued its order in this case which is not officially reported. The order of the Appellate Court of Illinois is reproduced in full in the Appendix to their Petition at App. B. An order of the Illinois Supreme Court denying Petitioner petition for leave to appeal is reproduced in the Appendix to this Petition at App. C.

JURISDICTIONAL STATEMENT

On October 3, 1985, the Appellate Court of Illinois, Fifth District filed its opinion affirming Petitioner's conviction of attempt robbery. Thereafter, on February 5, 1986, the Supreme Court of the State of Illinois denied Petitioner's petition for

leave to appeal. This Court has jurisdiction pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution, set out at Appendix D.

Illinois Revised Statutes 1983, Ch. 38, par. 1005-4-1, set out at Appendix E.

STATEMENT OF THE CASE

The petitioner, Daniel Hoeft, was arrested on December 12, 1983, and charged with the offenses of armed violence and attempt robbery. As a result of plea negotiations, the petitioner entered a plea of guilty on June 21, 1984, to the lesser offense of attempt robbery in exchange for the State's dismissal of the charge of armed violence and it's recommendation of a three year sentence.

At the sentencing hearing on August 1, 1984, the trial judge imposed a sentence of imprisonment for three years. Petitioner's attorney offered to produce witnesses to testify on behalf of the Petitioner to assist the court in exercising it's independent judgment with regard to the sentencing. Because of the fact that there had been a plea negotiation, the court refused to accept the evidence offered by petitioner in mitigation or to allow the petitioner to make a statement in his own behalf as required by Ill. Rev. Stat. 1983, Ch. 38, §1005-4-1.

On August 31, 1984, a Motion to Reconsider and/or Withdraw Guilty Plea was filed on behalf of the petitioner. Said motion was denied on September 20, 1984. On October 3, 1985, the Appellate Court of Illinois, Fifth District, affirmed the sentence imposed by the trial court. On February 5, 1986, the Supreme Court of the State of Illinois denied Petitioner's petition for leave for appeal.

ARGUMENT

The Illinois Revised Statutes, Chapter 38, 1005-4-1 (a) provide in pertinent part for a sentencing hearing as follows:

> §5-4-1. Sentencing hearing. (a) Except when the death penalty is sought under hearing procedures otherwise specified, after a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall:
>
> 3) consider evidence and information offered by the parties in aggravation and mitigation;
>
> 4) hear arguments as to sentencing alternatives; and
>
> 5) afford the defendant an opportunity to make a statement in his own behalf.
>
> b) All sentences shall be imposed by the judge based upon his independent assessment of the elements specified above and any agreement as to sentence reached by the parties...

The consideration of the factors specified in the above section are mandatory as evidenced by the use of the word "shall" rather than "may".

Here, the petitioner's attorney affirmatively tried to introduce evidence in mitigation which the court flatly refused to hear or allow counsel to summarize for the court. Further, the court did not afford the petitioner an opportunity to make a statement in his own behalf, and considered no sentencing alternatives such as a period of probation. In short, Petitioner was, in effect, denied a hearing.

Some of the requirements of procedural due process are explicit in the Bill of Rights, such as the right to a speedy trial, trial by jury, the right to confrontation, all of which are made applicable to the States through the Fourteenth Amendment.

Other requirements of procedural due process are not expressed but implied, such as the right to be heard. Whether such a right exists turns on the basic question of fairness.

The Petitioner argues here, that he had the constitutional right as a matter of procedural due process to be heard on the issue of punishment. The Court emphasized in *Townsend v. Burke,* 334 U.S. 736, 741, how the right to be heard through counsel might be crucial to avoid sentencing on a foundation "extensively and materially false". But the right to be heard also includes the right to speak for oneself.

The right to speak on one's own behalf at sentencing goes back to the common law right of allocution. In *Green v. United States,* 365 U.S. 301, 304, the Court states that it was recognized in 1689 that the court's failure to ask the defendant if he had anything to say before sentencing was imposed required reversal Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B.). The Court went on to say that despite major changes in criminal procedure since the seventeenth century:

> "...we see no reason why a procedural rule should be limited to circumstances under which it arose if reasons for the right it protects remain....the most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Id.* at 304.

Green involved Rule 32(a) of the Federal Rules of Criminal Procedure. That rule provides that the court must ask the defendant if he wishes to make a statement in his own behalf and to allow him to present any information in mitigation of punishment. The Illinois legislature has required the same standards in Ill. Rev. Stat. 1985, Ch. 38, §1005-4-1.

In *Hill v. United States,* 368 U.S. 424 the Court held that the lack of allocution was not an error subject to *collateral attack* (emphasis added), and that the right to be heard may be denied

absent a showing of aggravating circumstances or a claim that the defendant would have had anything to say. But in *United States v. Johnson,* 315 F.2d 714, where the defendant was sentenced under Title 18, §4208(c) and later, reports concerning the defendant were provided to the trial judge who affirmed defendant's sentence without a hearing, the Court held that the trial court could not speculate as to what the defendant or his counsel may have said or what legal moves they might have made to protect and preserve the defendant's rights at a hearing. Justice Douglas in a dissent in *McGautha v. California,* 402 U.S. 183 237 citing the *Johnson* case stated that "...where the opportunity to be heard on the sentence is denied both counsel and the defendant, the denial reaches constitutional proportions." Justice Douglas goes on to say:

> Whether the voice speaking for the defendant be counsel's voice or the defendant's, the right to be heard is often vital at the sentencing stage before the law decides the punishment of the person found guilty. *Mempa v. Rhay,* 389 U.S. 128, 135. The hearing whether on guilt or punishment, is governed by the requirements of due process. *Id.* at 237.

The petitioner argues here that both he and his counsel were denied the right to be heard. At one point in the sentencing proceeding, petitioner's attorney stated that he had several witnesses to testify. The trial judge indicated that if the matter was plea negotiated there was no need for testimony. (Appendix A, p. A-3). When petitioner's attorney offered to summarize the testimony, it was disallowed after the State's Attorney's objection. (Appendix A, p. A-4). The trial judge without hearing from petitioner or his attorney had his mind made up as to what sentence he would impose, and as petitioner's attorney repeatedly made an attempt to make a statement, the trial judge said, "Doesn't make any difference to me." (Appendix A, p. A-5). The trial judge took the position that since there was a plea negotiation he would consider no other sentence than that recommended by the State's Attorney.

It even appears that the judge disregarded the presentence investigation report once he realized that there was a plea agreement. (Appendix A, p. A-4). Ill. Rev. Stat. 1985, Ch. 38, §1005-4-1(b) provides that "all sentences shall be imposed by the judge based upon his independent assessment of the elements specified above *and* any agreement as to the sentence reached by the parties." (Emphasis added). The plea agreement, therefore, should have been only part of the judges basis for determining the sentence rather than the entire basis. The trial judge could not have made an independent assessment of the elements listed in §1005-4-1(a) because neither petitioner nor his attorney were allowed to be heard in that regard.

Without the petitioner and his counsel being allowed to speak at the sentencing hearing, the trial judge could not speculate as to what they might have said. A situation very similar to that in *United States v. Johnson,* (*supra*). The petitioner's lack of a criminal record, his good employment record, and the fact that he was supporting a wife and small child were not considered by the trial judge. Had the judge allowed the petitioner and his attorney to present these facts, he may have felt that a sentence of probation or the minimum sentence of imprisonment of two years would have been appropriate under the circumstances.

This is not a case where the petitioner is claiming that his right to confront witnesses or cross-examine witnesses was denied as in *Williams v. New York,* 337 U.S. 241 where statements in a pre-sentence report were considered. The petitioner here merely wanted to provide the court with character evidence and family background. The presentation of this evidence, or at least a summary of the evidence by petitioner or his attorney would not have been burdensome or onerous to the court. This is a basic question of fairness. What is fair turns on the importance of the interest which the court's action adversly affects and the strengths of the court's reasons for proceeding in summary fashion. The interests of the petitioner are his very liberty. The reasons for denying him a hearing are no likely more than a

desire to save time. Clearly, due process demands that the petitioner have a hearing at which he and his attorney are allowed to be heard.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the judgment below and should issue an order reversing and remanding said judgment.

Respectfully submitted,

Paul L. Dobberstein, Jr.
3641 Gravois
St. Louis, Missouri 63116
(314) 776-8400

Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

No. 83-CF-879

The People of the
State of Illinois

v.

Daniel Hoeft,
Defendant.

REPORT OF PROCEEDINGS

Filed August 14, 1984

Before the Hon. John J. Hoban

SENTENCING

August 1, 1984

APPEARANCES:

Ms. Lisa Struif
Assistant State's Attorney
On Behalf of the People;

Mr. Robert LeChien
Private Counsel
On Behalf of the Defendant.

Debra M. Musielak, CSR, CM
Official Court Reporter

BE IT REMEMBERED, that on the 1st day of August, 1984, the same being one of the regular judicial days of said court, the above-styled cause came on regularly for hearing before the HONORABLE JOHN J. HOBAN, one of the Judges at the St.

Clair County Building, 10 Public Square, in the City of Belleville, County of St. Clair, State of Illinois. Whereupon the following proceedings were had:

COURT CONVENED:

MR. LECHIEN: This is Daniel Hoeft, Your Honor.

THE COURT: Have you both read the pre-sentencing investigation and report?

MS. STRUIF: I have, Your Honor.

MR. LECHIEN: So have I, and the defendant and I have discussed its contents.

THE COURT: Any additions or corrections?

MR. LECHIEN: Yes, Your Honor, there are some additions and corrections. I would ask leave of Court to address those a little later, when I would present evidence in this matter.

THE COURT: Make them for the record?

MR. LECHIEN: All right. The first correction is in regard to the employment background of the defendant. Some of those are minor corrections, but none the less they need to be addressed. It states here that Mr. Gould, the owner of the trucking company for which the defendant works, indicated that the defendant began on March 1st, 1984. Mr. Gould is here and would testify that that instead was February. Mr. Hoeft has since gotten a raise, at Mr. Gould's trucking company, from the amount indicated on the pre-sentence report. Now earns $5 an hour, when he is employed as a mechanic and $8.64 when he drives the truck. His hours are estimated here on the basis of what he was employed during the winter. Since the trucks have been busy at Mr. Gould's business, his average work week is closer to the sixty to ninety-hour range. And, quite often up into the eighties per week.

Now, the only other correction is under the military service, the correction being that in the second sentence on the top of the page, Mr. Hoeft was in the Navy for four years. The dates bear that out, but it states a three-year term. It was a four-year term.

That's the only additions I would have to the report, Your Honor. I'm sure this is just as far as employment goes, those are probably pretty recent developments, wouldn't have been included in here because of the changes in recent past.

THE COURT: What do you have to say, Miss State's Attorney?

MS. STRUIF: Your Honor, we would just ask The Court to abide by the plea negotiations, where that in exchange for the reduction of the charge, that the defendant be placed in the Department of Corrections for three years.

THE COURT: Was that a plea agreement, or plea negotiation?

MS. STRUIF: Yes, it was, Your Honor.

THE COURT: Very well. What do you have to say, Mr. Hoeft?

MR. LECHIEN: Your Honor, if I might present some testimony.

THE COURT: Testimony, you have testimony?

MR. LECHIEN: Yes, Your Honor, I've got several witnesses here.

THE COURT: If it's plea negotiated there is no need for the testimony, unless you are not going to abide by the plea negotiations.

MR. LECHIEN: Your Honor, I was going to submit this evidence to The Court on the basis that for The Court to exercise its independent judgment regarding this sentencing.

THE COURT: If you've negotiated you are asking me — you gave it to me — I'll do one of two things, I'll abide by the plea negotiations, we have gone this far, or I'll set it aside, reinstate his plea of not guilty, we will go to trial.

MR. LECHIEN: Well, Your Honor, if I might summarize for the record what the testimony would be.

THE COURT: Tell me, but I don't want to hear a lot of testimony where there has been plea negotiations.

MR. LECHIEN: All right, Your Honor, thank you. Your Honor, the testimony would be from Mr. Gould as indicated in the pre-sentence investigation that the defendant is a good employee.

MS. STRUIF: For the record, I would object to any narrative of what the testimony would be, basically because this is a negotiated plea. I agree with The Court if they are not going to abide by the plea negotiations, we would ask the original charges be reinstated and we go to trial.

THE COURT: All right. That's the way it will be.

MR. LECHIEN: Am I not supposed to submit what the testimony would be?

THE COURT: What good does it do, Bob?

MR. LECHIEN: Well, Your Honor, I think The Court can look at this independent of the —

THE COURT: Hey, you are asking me, I told you what I was going to do, either abide by them, or I'll set his plea aside, reinstate his plea of not guilty to both charges.

MR. LECHIEN: Well, Your Honor, the — trial.

MR. LECHIEN: Well, Your Honor, if I might summarize for the record what the testimony would be.

THE COURT: Tell me, but I don't want to hear a lot of testimony where there has been plea negotiations.

MR. LECHIEN: All right, Your Honor, thank you. Your Honor, the testimony would be from Mr. Gould as indicated in the pre-sentence investigation that the defendant is a good employee.

MS. STRUIF: For the record, I would object to any narrative of what the testimony would be, basically because this is a negotiated plea. I agree with The Court if they are not going to abide by the plea negotiations, we would ask the original charges be reinstated and we go to trial.

THE COURT: All right. That's the way it will be.

MR. LECHIEN: Am I not supposed to submit what the testimony would be?

THE COURT: What good does it do, Bob?

MR. LECHIEN: Well, Your Honor, I think The Court can look at this independent of the —

THE COURT: Hey, you are asking me, I told you what I was going to do, either abide by them, or I'll set his plea aside, reinstate his plea of not guilty to both charges.

MR. LECHIEN: Well, Your Honor, the —

THE COURT: Doesn't make any difference to me.

MR. LECHIEN: The record reflects the statements of the man that I was going to call anyway. I would make a statement to you.

THE COURT: Don't plea negotiate then come in and try to weasel on the plea negotiations. What do you want to do?

MR. LECHIEN: Your Honor, we will proceed with the sentencing.

THE COURT: Court has made an independent assessment of the pre-sentencing investigation and the report. There have been plea negotiations. There is no evidence offered in aggravation or in mitigation because of that fact. The Court will abide by the plea negotiations.

The defendant is hereby sentenced into the custody of the Department of Criminal Corrections for placement in an institution of their choosing and there to stay for a period of three years or until he's otherwise discharged by virtue of law. Mittimus to issue.

Court further advises the defendant that he has thirty days from today to file in this court a written motion asking me to vacate and set aside the judgment I've just — or the sentence I've just imposed. In the motion, he shall set forth the grounds upon which he relies. We will have a hearing on your motion. If your motion is well taken, I'll vacate, set it aside, reinstate your plea of not guilty, we will go to trial on both charges, Armed Violence, and the second charge, charge of which you just pled. If I feel it's not well taken, I'll deny it, and you'll have thirty days to appeal to the Fifth District Appellate Court.

Judgment is entered upon the plea of guilty, finding of the defendant's age and the sentence just imposed.

The defendant is assessed the costs of court out of the cash bond presently on deposit with the Clerk of the Court. That will be the order of the Court.

MR. LECHIEN: Your Honor, would you grant leave for the defendant to visit briefly with his family?

THE COURT: Do what?

MR. LECHIEN: Would you grant leave for the defendant to visit briefly with his family, before he's taken away.

THE COURT: In the presence of the bailiff.

MR. LECHIEN: Thank you.

COURT ADJOURNED:

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

No. 5-84-0833

The People of the State of Illinois,
Plaintiff-Appellee,

v.

Daniel Hoeft,
Defendant-Appellant.

Appeal from the Circuit
court of St. Clair County.

Honorable John J. Hoban,
Judge Presiding.

JONES, P.J.

ORDER

The defendant, Daniel Hoeft, pleaded guilty to attempt robbery and was sentenced to three years' imprisonment. Defendant subsequently filed a motion to withdraw his plea of guilty pursuant to Supreme Court Rule 604(d) (87 Ill. 2d R. 604(d)), which was denied after a hearing. Defendant on appeal contends that the sentence should be vacated because he was not allowed to present evidence in mitigation at the sentencing hearing and because the court did not specify the reasons on the record for the sentence.

Defendant was indicted for armed violence and attempt armed robbery. On June 21, 1984, the State made a motion to amend the charge of attempt armed robbery to attempt robbery and to dismiss the armed violence charge. In exchange for defendant's plea of guilty to attempt robbery, the State would

recommend a sentence of three years. Defendant did not comment. The court then substantially complied with Supreme Court Rule 402. (87 Ill. 2d R. 402.) The court stated that even though there had been plea negotiations, the court was not bound thereby and would make the sole determination of punishment, and defendant responded that he understood. The court then asked defendant if he wanted to ask the court anything, and defendant responded that he did not. The court then accepted defendant's plea of guilty to attempt robbery.

On August 1, 1984, the sentencing hearing was conducted. At the commencement of the sentencing hearing, defense counsel corrected the presentence report by updating defendant's employment status and then indicated that he wished to present testimony in mitigation. The court stated: "If it's plea negotiated, there is no need for the testimony, unless you are not going to abide by the plea negotiations." Defense counsel responded that the evidence was to facilitate the court's independent judgment regarding sentencing. The court stated that it would concur in the plea negotiations or reinstate the plea of not guilty and the original charges. Defense counsel stated that the proposed testimony would be from Mr. Gould, defendant's employer, who would testify that defendant is a good employee and added that "the record reflects the statements of the man that I was going to call anyway." The court again concurred in the plea negotiations and imposed a three-year sentence for attempt robbery.

On August 31, 1984, defendant filed his motion to withdraw his plea of guilty. The motion alleged that defendant was under the impression that he would have all of the opportunities available to any other criminal defendant pursuant to sections 5-4-1(a) and (b) of the Unified Code of Corrections (Ill. Rev. Stat. 1983, ch. 38, par. 1005-4-1(a), (b)). The motion further alleged that the court did not allow evidence in mitigation in contravention of par. 5-4-1(a) and (b). The motion lastly alleged that the court did not exercise its independent assessment of the statutory factors.

On September 20, 1984, a hearing was held on the motion to withdraw the plea. The court denied the motion and stated: "The guilty plea years that they have agreed upon is only on advisory capacity. The Court had, through an independent assessment, arrived at the same figure they had in there [sic] thing, so that is the reason I'm denying it."

Attempt robbery is a Class 3 felony for which a penal sentence of not less than two years and not more than five years may be imposed. (Ill. Rev. Stat. 1983, ch. 38, pars. 8-4(c)(4), 18-1(b), 1005-8-1(a)(6).) Therefore, defendant was sentenced to one year in excess of the penal minimum. Since defendant entered a negotiated plea of guilty he voluntarily accepted a sentence in excess of the statutory minimum and thereby recognized and admitted that such sentence was fair and justified in the light of his history and character and the nature and circumstances of the offense. (*People v. Whitehead* (1975), 32 Ill. App. 3d 615, 616, 336 N.E.2d 59, 61.) In the case at bar, the court continued the cause for a presentence investigation. After reviewing the investigation, the court reached an independent conclusion that a three-year sentence was proper and concurred in the plea negotiations. When this type of negotiated plea is employed, and the trial judge concurs in the disposition recommended by the parties, there is no necessity for a formal sentencing hearing. (See *People v. Barto* (1976), 63 Ill. 2d 17, 22, 344 N.E.2d 433, 436.) When defendant submits a negotiated plea which is accepted by the court, there is no cause to present mitigating evidence.

Assuming, arguendo, that the court erred in refusing to allow Mr. Gould to testify, such error was harmless as defense counsel stated that the testimony would be a repetition of the information contained in the presentence investigation. The omission of procedures in a sentencing hearing, which amounts to a technical or formal error without prejudice to the defendant, does not require remedying. (*People v. Brown* (1980), 89 Ill. App. 3d 852, 860, 412 N.E.2d 580, 586; *People v. Williams*

(1981), 96 Ill. App. 3d 958, 965, 422 N.E.2d 199, 205.) On the facts of this case, we perceive no prejudice to defendant.

Lastly, defendant contends that the sentence should be vacated because the trial court did not specify the reasons for the sentencing determination. Defendant did not raise the issue in his motion to withdraw his plea of guilty; therefore, the issue is waived. (Rule 604(d); 87 Ill. 2d R. 604(d).) The issue is also waived for failure to request specific reasons in the trial court. See *People v. Davis* (1982), 93 Ill. 2d 155, 162-63, 442 N.E.2d 855, 858.

AFFIRMED.

HARRISON and KASSERMAN, JJ., concur.

APPENDIX C

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

February 5, 1986

Mr. Jim D. Keehner
Attorney at Law
P. O. Box 37
Belleville, IL 62222

No. 62640 - People State of Illinois, respondent, v. Daniel Hoeft, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1986.

APPENDIX D

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or a representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any state, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall

have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave, but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

ILLINOIS REVISED STATUTES

Chapter 38 ¶1005-4-1. Sentencing Hearing. (a) Except when the death penalty is sought under hearing procedures otherwise specified, after a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall:

(1) consider the evidence, if any, received upon the trial;

(2) consider any presentence reports;

(3) consider evidence and information offered by the parties in aggravation and mitigation;

(4) hear arguments as to sentencing alternatives; and

(5) afford the defendant the opportunity to make a statement in his own behalf.

(b) All sentences shall be imposed by the judge based upon his independent assessment of the elements specified above and any agreement as to sentence reached by the parties. The judge who presided at the trial or the judge who accepted the plea of guilty shall impose the sentence unless he is no longer sitting as a judge in that court. Where the judge does not impose sentence at the same time on all defendants who are convicted as a result of being involved in the same offense, the defendant or the state's attorney may advise the sentencing court of the disposition of any other defendants who have been sentenced.

(c) In imposing a sentence for a felony, the trial judge shall specify on the record the particular evidence, information, factors in mitigation and aggravation or other reasons that led to his sentencing determination. The full verbatim record of the sentencing hearing shall be filed with the clerk of the court and shall be a public record.

(d) When the defendant is committed to the Department of Corrections, the State's Attorney shall and counsel for the

defendant may file a statement with the clerk of the court to be transmitted to the department, agency or institution to which the defendant is committed to furnish such department, agency or institution with the facts and circumstances of the offense for which the person was committed together with all other factual information accessible to them in regard to the person prior to his commitment relative to his habits, associates, disposition and reputation and any other facts and circumstances which may aid such department, agency or institution during its custody of such person. The clerk shall within 10 days after receiving any such statements transmit a copy to such department, agency or institution and a copy to the other party, provided, however, that this shall not be cause for delay in conveying the person to the department, agency or institution to which he has been committed.

(e) The clerk of the court shall transmit to the department, agency or institution, if any, to which the defendant is committed, the following:

(1) the sentence imposed;

(2) any statement by the court of the basis for imposing the sentence;

(3) any presentence reports;

(4) the number of days, if any, which the defendant has been in custody and for which he is entitled to credit against the sentence, which information shall be provided to the clerk by the sheriff;

(5) all statements filed under paragraph (d) of this Section;

(6) any medical or mental health records or summaries of the defendant; and

(7) all additional matters which the court directs the clerk to transmit.

Supreme Court, U.S.
FILED
JUN 24
CLERK

No. 85-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL HOEFT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA J. STEWART
Solicitor General, State of Illinois
MARK L. ROTERT *
MARIE QUINLIVAN CZECH **
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570
ATTORNEYS FOR RESPONDENT

JOHN BARICEVIC
State's Attorney, St. Clair County
OF COUNSEL

* Counsel of Record.
** William Pistorius, a student at DePaul University College of Law, assisted in the research and preparation of this Brief in Opposition.

Printed by Authority of the State of Illinois (P.O. 33281—50—6-20-86)

QUESTION PRESENTED FOR REVIEW

Whether this Court should consider petitioner's argument that he was denied due process where he was not allowed to present witnesses at his mitigation sentencing hearing after pleading guilty where the facts are not as petitioner claims them to be, the statute petitioner relies upon is not under constitutional attack, and decisions of this Court lend no credence to petitioner's position.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
RELEVANT STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I.	
THIS COURT SHOULD NOT ADDRESS THE MERITS OF THIS CASE BECAUSE PETITIONER'S ARGUMENT IS ENTIRELY FACTUAL. FURTHERMORE, PETITIONER WAS TREATED FAIRLY IN THE COURTS BELOW AND, THEREFORE, GRANTING REVIEW WOULD BE OF NO PRECEDENTIAL VALUE .	3
II.	
THIS COURT HAS NEVER HELD THAT A CRIMINAL DEFENDANT HAS A RIGHT TO A FULL SENTENCING HEARING AFTER ENTERING A PLEA OF GUILTY. FURTHERMORE, ILLINOIS SPECIFICALLY PROVIDES THAT A FULL SENTENCING HEARING IS NOT REQUIRED FOLLOWING SUCH A NEGOTIATED PLEA	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	PAGE(S)
Green v. United States, 365 U.S. 301 (1960) ...	5
Hill v. United States, 368 U.S. 424 (1962)	5
People v. Barto, 63 Ill. 2d 17, 344 N.E.2d 433 (1976)	6
People v. Cooper, 33 Ill. App. 3d 367, 342 N.E.2d 413 (5th Dist. 1975)	6
People v. Melvin, 27 Ill. App. 3d 269, 327 N.E.2d 139 (5th Dist. 1975)	6
Texas v. Mead, ___ U.S. ___, 104 S.Ct. 1318 (1984)	4
Townsend v. Burke, 334 U.S. 736 (1948)	5
United States v. Johnson, 315 F.2d 714 (2d Cir. 1963)	5
United States v. Johnston, 268 U.S. 220 (1925) ..	4

Statutes	
Federal Rules of Criminal Procedure, Rule 32(a) .	5
Illinois Revised Statutes 1983, ch. 38, § 1005-4-1(a) .	6
Illinois Revised Statutes 1983, ch. 110A, Rule 402(d)(2)	1, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL HOEFT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

RELEVANT STATUTE INVOLVED

Illinois Revised Statutes 1983,
ch. 110A, Rule 402(d)(2)

If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At

the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representation made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.

STATEMENT OF THE CASE

Petitioner pled guilty to attempt robbery on June 21, 1984. The negotiated plea called for a sentence of three years. Petitioner was sentenced on August 1, 1984. At that time, a presentence report was presented to the sentencing court and attorneys for both the State and petitioner. (Pet. App. A-2)* Petitioner's counsel made several additions and corrections to the presentence report. He went into great detail concerning petitioner's most recent employment and the raise that employer had given petitioner. (Pet. App. A-2) He also explained that the report should be corrected to show that petitioner had served four years in the Navy rather than three. (Pet. App. A-3)

* References are to Petitioner's Appendix.

After noting these corrections, the trial court asked petitioner what he had to say. (Pet. App. A-3) Petitioner made no response.

Thereafter, counsel asked to present testimony on petitioner's behalf. The court refused counsel's request. (Pet. App. A-4) Petitioner's counsel agreed to not present the witnesses. (Pet. App. A-4) He said that his purpose in presenting testimony was to inform the court that petitioner had been a good employee. (Pet. App. A-5) He said that "the record reflects the statements of the man that I was going to call anyway." (Pet. App. A-5)

The sentencing court then said that it had made an independent assessment of the pre-sentencing investigation and report. (Pet. App. A-6) The court said that because there had been plea negotiations there would be no evidence in aggravation and mitigation. (Pet. App. A-6) The court said that it would abide by the plea negotiations and sentenced petitioner to three years imprisonment. (Pet. App. A-6)

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT ADDRESS THE MERITS OF THIS CASE BECAUSE PETITIONER'S ARGUMENT IS ENTIRELY FACTUAL. FURTHERMORE, PETITIONER WAS TREATED FAIRLY IN THE COURTS BELOW AND, THEREFORE, GRANTING REVIEW WOULD BE OF NO PRECEDENTIAL VALUE.

Petitioner argues that because he was not permitted to present witnesses in mitigation at his sentencing hearing after pleading guilty, he was denied procedural due proc-

ess. Such a claim is purely factual in nature. Petitioner does not argue that the Illinois statute he relies upon is unconstitutional, but rather that the statute as applied to the facts of his case denied him a fair hearing. However, the purpose of granting certiorari is not to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *Accord, Texas v. Mead*, ___ U.S. ___, 104 S.Ct. 1318, 1320 (1984). If this Court were to grant review in the instant case, the result would be a factually specific opinion with little or no precedential value.

Moreover, petitioner has been treated fairly. Petitioner conceded his guilt in the course of good-faith negotiations and agreed to the exact sentence which he eventually received. The trial judge offered petitioner an opportunity for allocution which was not acted upon. (Pet. App. A-3) Petitioner's attorney was allowed to amend and correct the presentence report. (Pet. App. A-2, A-3) The only evidence not permitted was character witness testimony, and, when this was denied, petitioner's attorney stated that the "record reflects the statements of the man I was going to call anyway." (Pet. App. A-5)

Moreover, contrary to petitioner's argument, the sentencing court said that it had independently considered the presentence report. (Pet. App. A-6)

Hence, this Court need not grant certiorari in this case merely to review the facts. Such review would yield an opinion with no precedential value. Nor does justice require review since petitioner received fair treatment in the courts below.

II.

THIS COURT HAS NEVER HELD THAT A CRIMINAL DEFENDANT HAS A RIGHT TO A FULL SENTENCING HEARING AFTER ENTERING A PLEA OF GUILTY. FURTHERMORE, ILLINOIS SPECIFICALLY PROVIDES THAT A FULL SENTENCING HEARING IS NOT REQUIRED FOLLOWING SUCH A NEGOTIATED PLEA.

This Court has held that a criminal defendant has no constitutional right to allocution. *Hill v. United States*, 368 U.S. 424, 428-29 (1962). Moreover, this Court has never granted a criminal defendant the right to a full hearing following a negotiated plea. The decisions petitioner relies upon are inapposite.

In *Townsend v. Burke*, 334 U.S. 736 (1948), the trial judge violated due process by basing his sentencing decision on assumptions that were materially untrue. Such was not the case here. As already indicated in respondent's Argument I, petitioner's counsel not only presented evidence in mitigation, but he painstakingly corrected the minor errors that did appear in the record. (Pet. App. A-2, A-3)

The remaining authority petitioner largely relies upon are cases involving Rule 32(a) of the Federal Rules of Criminal Procedure, which grants a federal criminal defendant the right of allocution. *Green v. United States*, 365 U.S. 301 (1960), *United States v. Johnson*, 315 F.2d 714 (2d Cir. 1963). Not only are the federal rules inapplicable to state trials, but, as already noted, the sentencing court gave petitioner an opportunity to speak on his own behalf. (Pet. App. A-3)

The law governing sentencing hearings in Illinois is very clear. When the type of negotiated plea that was involved in this case is employed, and the trial judge concurs in the disposition recommended by the parties, there is no

necessity for a formal sentencing hearing. Ill. Rev. Stat. 1983, ch. 110A, Rule 402(d)(2); *People v. Barto*, 63 Ill.2d 17, 344 N.E.2d 433 (1976). It is clear from the language of Rule 402(d)(2) that it is discretionary with the trial court as to whether or not to hear evidence in mitigation. It is equally clear from the record before this Court that the trial judge here considered evidence in mitigation and still concurred in the disposition recommended by both parties.

The Illinois statute relied upon by the petitioner only mandates a sentencing hearing in those cases involving a *determination* of guilt. Illinois Revised Statutes 1983, ch. 38, § 1005-4-1(a). In *People v. Melvin*, 27 Ill. App. 3d 269, 327 N.E.2d 139 (5th Dist. 1975) and *People v. Cooper*, 33 Ill. App. 3d 367, 342 N.E.2d 413 (5th Dist. 1975), the Illinois Appellate Court differentiated between sentencing following a negotiated plea and sentencing following a determination of guilt. The court explained that the statute made sentencing mandatory only following a determination of guilt. In a plea negotiation, however, the defendant confesses guilt. Thus, there has been no determination of guilt and the sentencing hearing is not required. *Melvin*, 27 Ill. App. 3d at 273.

The *Melvin* court also reasoned that the defendant who negotiates a plea does so in reliance on promises from the state. He presents all relevant sentencing factors to the state and avoids "having those factors considered by someone else in the determination of the sentence." *Id.* Hence, the defendant actually agrees to not present factors in mitigation to the court.

Therefore, since this Court has never held that a criminal defendant has a right to a full sentencing hearing following a negotiated plea, petitioner has not suffered any

constitutional wrong. Also, Illinois law specifically provides that a full sentencing hearing is not necessary after a defendant's negotiated plea. Thus, the Illinois courts were not at all remiss in their treatment of petitioner and review by this Court is unnecessary.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA J. STEWART
Solicitor General, State of Illinois

MARK L ROTERT *
MARIE QUINLIVAN CZECH **
Assistant Attorneys General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-2570

ATTORNEYS FOR RESPONDENT

JOHN BARICEVIC
State's Attorney, St. Clair County

OF COUNSEL

* Counsel of Record.

** William Pistorius, a student at DePaul University College of Law, assisted in the research and preparation of this Brief in Opposition.